APPENDIX G

Opinion of the New York Court of Appeals in People v. Martinez

Published at 82 N.Y.2d 436, 604 N.Y.S.2d 932, 624 N.E.2d 1027 (1993)

The PEOPLE of the State of New York, Respondent,
v.
Buenaventura MARTINEZ, Appellant.

The PEOPLE of the State of New York, Respondent,
v.
Howard PEARSON, Appellant.
Court of Appeals of New York.
Nov. 23, 1993.

OPINION OF THE COURT

Chief Judge KAYE.

These appeals of two "buy-and-bust" cases present the question whether defendant's right to a public trial was violated when the trial court ordered the courtroom closed during the testimony of the undercover officer who made the buy. We conclude in the first case that defendant's right was violated, but uphold closure in the second.

People v. Martinez

According to the trial testimony, on February 14, 1990, an undercover officer approached defendant at 158th Street and Melrose Avenue in the Bronx, and obtained two "glassines" of

heroin from him in exchange for $20 of prerecorded "buy money." The officer then returned to his vehicle and radioed a description to fellow members of the Bronx Tactical Narcotics Team (TNT), and defendant was thereafter arrested and identified in a "drive-by" by the undercover.

At trial, the prosecutor requested that the courtroom be closed during the undercover officer's testimony, defendant objected, and a closed hearing was held to explore the issue. The sole witness at the hearing was the undercover, whose direct testimony in its entirety was as follows:

> "Q Detective, are you presently an undercover for Bronx TNT?
> "A Yes, I am.
> "Q Are you still actively engaged in cases in the Bronx area?
> "A Yes, I am.
> "Q Do you have any open cases which have still not yet gone to trial?
> "A Yes.
> "Q Do you fear for your safety if the courtroom is not closed in this case?
> "A Yes."

On cross-examination, defense counsel established that the officer's open cases were all "street level buy operations" in which arrests had already been made, and the trial court elicited that the officer's area of operations was "the whole Bronx." Defense counsel argued that a sufficient showing had not been made, but the court rejected that argument and ordered the courtroom closed during the undercover officer's testimony, finding "serious possibility that any pending investigations or the officer's safety would be jeopardized absent closing the courtroom."

After open-court testimony by the arresting officer and entry of a stipulation that the glassines contained one grain of heroin, defendant was convicted of third degree criminal sale of a controlled substance, and sentenced to an indeterminate prison term of 4 1/2 to 9 years. The Appellate Division affirmed, concluding that the undercover's testimony warranted closure.

People v. Pearson

The evidence at trial revealed that on the afternoon of April 6, 1990, defendant was approached by an undercover officer on the corner of Eighth Avenue and 42nd Street in the Times Square area of Manhattan. At the officer's request, defendant supplied two vials of crack, and she paid him with $10 of prerecorded "buy money." The officer then radioed for backup, and defendant and a codefendant were arrested and charged with drug possession and sale.

As in *Martinez*, at defendant's trial the People requested that the courtroom be closed during the undercover officer's testimony, and defendant objected. By agreement of the parties, the only spectator in the courtroom prior to the hearing (a person apparently known to the prosecutor and the Judge) was asked to leave, and the courtroom was closed for the hearing.

The officer, again, was the sole witness at the hearing. She testified that she was an active undercover officer and had been on duty in the area of West 42nd Street and Eighth Avenue approximately 25 times during the previous 30 days; that she was involved in ongoing investigations in that area, and would be returning to work there immediately after testifying; and that if she were to testify in open court her "cover could be blown and [she] could possibly get killed." She further testified that she routinely enters courthouses through back entrances to avoid being "exposed" to potential future defendants who might be milling about the lobby. In opposing closure, defense counsel

urged that the evidence was not sufficiently compelling to overcome defendant's right to a public trial; that the undercover's contemplated "buy-and-busts" were not the sort of ongoing investigation that required closure; and that more substantial proof of actual danger was required.

Noting that there had been only one spectator to that point, and putting aside any concern for jeopardizing ongoing buy-and-busts "because that's not what the witness is talking about," the trial court ruled that the courtroom should be closed because of the officer's continuing active engagement in the area and consequent personal risk. "[S]he has reason to fear retaliation from people who might put two and two together realizing that she has been the person engaging in the undercover purchase of narcotics from those people who do business in that location." In response to defense counsel's argument, the trial court noted that the last time it conducted a *Hinton* hearing it denied the People's motion to close the courtroom, and that closure was by no means automatic.

After the undercover officer testified in a closed courtroom, the remaining testimony (from the backup officer and two chemists) was taken in open court. Defendant was convicted as charged and sentenced to 5 to 10 years' imprisonment. The Appellate Division affirmed.

Analysis

Analysis begins with several well-recognized propositions. The guarantee of a public trial (U.S. Const. 6th Amend.; Civil Rights Law § 12; Judiciary Law § 4) is fundamental, but neither absolute nor inflexible. Trial courts unquestionably have discretionary authority to exclude the public, but must exercise that discretion "sparingly * * * and then, only when unusual circumstances necessitate it." (*People v. Hinton*, 31 N.Y.2d 71, 76, 334 N.Y.S.2d 885, 286 N.E.2d 265, *cert. denied* 410 U.S.

911, 93 S.Ct. 970, 35 L.Ed.2d 273.) As the case law makes plain, both the defendant and society at large have a vital stake in the concept of a public trial (*see, e.g., Hinton*, 31 N.Y.2d, at 73, 334 N.Y.S.2d 885, 286 N.E.2d 265; *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31).

In *Hinton* itself, the courtroom was closed for the testimony of an undercover agent on a representation that the undercover was still operating actively in the community; that other narcotics investigations were pending; and that other targets in these investigations were present in the courtroom, thus jeopardizing the agent's life if his identity were exposed. Where "the very presence of other investigatory targets posed a threat to the agent's life," we concluded that the requisite unusual circumstances had been shown to justify closure (31 N.Y.2d, at 75, 334 N.Y.S.2d 885, 286 N.E.2d 265). Other examples of unusual circumstances mentioned in *Hinton* included the presence of gang members in the courtroom, and threats received by the witness.

In *People v. Jones*, 47 N.Y.2d 409, 418 N.Y.S.2d 359, 391 N.E.2d 1335, *cert. denied* 444 U.S. 946, 100 S.Ct. 307, 62 L.Ed.2d 315, we overturned the trial court's discretionary closure, which had been ordered as a matter of judicial notice that undercover narcotics work in New York City was dangerous. As this Court noted, a trial court's own impressions of the general vicissitudes of undercover narcotics work do not suffice for closure. "There should have been a factual showing that an exception to the norm of a public trial was justified * * * That undercover work at times entails serious threats to the safety of agents was by no means sufficient to connect that threat to this witness." (47 N.Y.2d at 415, 418 N.Y.S.2d 359, 391 N.E.2d 1335.)

Since *Jones*, our admonition that there should be a factual showing to support closure has resulted in "*Hinton* hearings" where--as in the cases before us--the undercover officer may, in

a closed hearing, be examined and cross-examined. Since *Jones*, also, the United States Supreme Court has further particularized the standard for closure under the Sixth Amendment, which we recognized in *People v. Kin Kan*, 78 N.Y.2d 54, 58, 571 N.Y.S.2d 436, 574 N.E.2d 1042 as a four-pronged test:

> "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure" (*Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216, *supra*).

In *Kin Kan*, involving gang-related, large-scale drug trafficking, the prospective witness (an accomplice) testified that he was still involved as a confidential informant in an ongoing investigation, that he feared retaliation by defendant's "people" (but not her family), and that he feared retaliation from persons connected with his continuing informant activity and from their friends and did not want to show his face in public. Even then, however, we agreed with the Appellate Division that the trial court had erred in barring defendant's family from the courtroom: "as a matter of law under the governing legal principles * * * the delicate balancing of Kan's individualized right to a public trial against the accomplice witness's expressed fears of retaliation tips in favor of respondent Kan." (78 N.Y.2d, at 58, 571 N.Y.S.2d 436, 574 N.E.2d 1042.) The requisite "delicate balancing" echoes the Supreme Court's caution in *Waller* that, in determining the issue of closure, "the balance of interests must be struck with special care." (467 U.S. at 45, 104 S.Ct. at 2215.)

Applying these precedents to the facts at hand, we conclude that the People's perfunctory showing in *Martinez* was insufficient to meet the standards for closure repeatedly insisted upon by this Court and the Supreme Court. We agree with defendant's observation that, were such a showing accepted, we would in effect sanction a rule of per se closure for undercover officers, for the testimony established no more than the officer's continuing activity as an undercover "in the Bronx area"--more than 41 square miles and 1.2 million residents--and "unparticularized impressions of the vicissitudes of undercover narcotics work in general." (*Jones*, 47 N.Y.2d at 415, 418 N.Y.S.2d 359, 391 N.E.2d 1335.) No reference was made, for example, to associates of defendant or targets of investigation likely to be present in the courtroom, or to threats received. Indeed, no link was made, or even attempted, between the officer's fear for his safety throughout the Bronx area and open-court testimony in this buy-and-bust case.

While the trial court, reading its ruling into the record, acknowledged that special care must be taken before a courtroom is closed to the public, its holding that "pending investigations or the officer's safety would be jeopardized absent closing the courtroom" is supported only by the officer's own assertion that he feared for his safety if the courtroom was not closed.

By contrast, the factual showing supporting closure in *Pearson* more closely approximates the standard reflected in the case law. In her testimony, the undercover officer identified a particular location--Port Authority in Manhattan, the site of defendant's arrest--readily accessible from the Manhattan courthouse, at which she had functioned daily for a month, and to which she would return as an undercover that very day to complete her work with drug dealers. We cannot say that the trial court abused its discretion in concluding that, in these circumstances, testifying in an open courtroom might endanger the undercover officer's safety.

Even assuming *Waller's* first prong was satisfied by evidence that the People established an overriding interest justifying closure, defendant Pearson argues that his conviction should nonetheless be reversed because the trial court made no effort to meet *Waller's* third prong--that the court "consider reasonable alternatives to closing the proceeding." (*Waller*, 467 U.S. at 48, 104 S.Ct. at 2216.) Before this Court, defendant suggests that a court officer might have been stationed at the door to admit at least those persons who posed no threat to the officer's safety, or defendant might have been asked to name family members or others who could have been admitted, or that the undercover might have testified in open court from behind a screen, as in *United States v. Lucas* (932 F.2d 1210, 1216-1217 [8th Cir.], *cert. denied* --- U.S. ----, 112 S.Ct. 399, 116 L.Ed.2d 348).

While it is surely the better practice, and indeed may be the required practice, for a trial court explicitly to consider whether closure is broader than necessary, to explore reasonable alternatives to closure, and to make findings adequate to support closure (*see, Waller*, 467 U.S. at 48, 104 S.Ct. at 2216), on the present record the court's failure to consider the alternatives defendant now suggests was not error. Defendant's sole objection and the entire argument before the trial court was concentrated on the sufficiency of the People's showing for closure. There had been no unidentified spectators in the courtroom from the time the trial started, and defendant made no mention of particular friends or family he wished to have in attendance (*see, by contrast, Kin Kan*, 78 N.Y.2d at 58, 571 N.Y.S.2d 436, 574 N.E.2d 1042). Such measures as stationing a guard at the door, taking names and using a screen might well be investigated in future cases, but on this record the trial court did not err in failing to consider them.

Accordingly, in *Martinez*, the Appellate Division order should be reversed and a new trial ordered, and in *Pearson* the Appellate Division order should be affirmed.

Judges SIMONS, TITONE, HANCOCK, BELLACOSA, SMITH and LEVINE, JJ., concur.

In *People v. Martinez*: On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order reversed and a new trial ordered.

In *People v. Pearson*: Order affirmed.

APPENDIX H

APPENDIX H

Opinion of the United States Court of Appeals for the Second Circuit in Pearson v. James

(Cite as 1997 WL 33521 (2nd Cir. N.Y.))

Howard PEARSON, Petitioner-Appellant,
v.
Charles JAMES, Superintendent of Collins Correctional Facility, Respondent-Appellee.
Nos. 1669, 95-2801.
United States Court of Appeals,
Second Circuit.
Argued June 4, 1996.
Decided January 30, 1997.

Before: NEWMAN, Chief Judge, JACOBS and CABRANES, Circuit Judges.

Appeal from the October 26, 1995, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge) denying his petition for a writ of habeas corpus to challenge his state court conviction because the courtroom was closed during testimony of an undercover police officer without considering alternatives to closure.

Reversed and remanded with directions to issue the writ unless the State retries the defendant within a reasonable time. Judges Jacobs and Cabranes concur with a separate opinion.

Diane E. Courselle, New York, N.Y. (E. Joshua Rosenkranz, Joseph M. Nursey, Office of the Appellate Defender, New York, N.Y., on the brief), for petitioner-appellant.

Louis L. Bono, Asst. Atty. Gen., New York, N.Y. (Dennis C. Vacco, N.Y. State Atty. Gen., Barbara Gott Billet, Darrell M. Joseph, Office of the N.Y. State Atty. Gen., New York, N.Y., on the brief), for respondent-appellee.

JOHN O. NEWMAN, Chief Judge:

In Ayala v. Speckard, 89 F.3d 91 (2d Cir.), modified on denial of rehearing, --- F.3d ---- (2d Cir.1996), this Court ruled that a defendant's constitutional right to a public trial is violated when a trial judge closes a courtroom for a valid reason but fails to consider, on his own motion, alternatives to closure that would adequately protect the state interest justifying the closure. That ruling governs this appeal by Howard Pearson from the October 26, 1995, judgment of the District Court for the Southern District of New York (Peter Leisure, District Judge) denying his petition for a writ of habeas corpus to challenge his state court conviction for selling cocaine to an undercover police officer. The state court trial judge closed the courtroom during the testimony of the officer but did not consider any alternatives to courtroom closure. Ayala requires us to reverse.

Facts

Pearson was arrested after an undercover police officer, conducting a routine "buy and bust" operation, purchased $10 worth of cocaine from him near the corner of 42nd Street and Eighth Avenue in Manhattan. The transaction was one of 200 effected by the officer in the preceding 15 months.

At trial in 1990, the prosecutor moved to have the courtroom closed during the officer's testimony, asserting that her safety and her work as an undercover would be compromised if she testified in open court. With the defendant's agreement, the courtroom was closed for a hearing to determine closure during

the officer's trial testimony. In support of the closure request, the officer testified that she was continuing her undercover work in the neighborhood of her purchase from Pearson, that she feared public exposure and that if her identity was revealed, "my cover could be blown and I could get killed." She also said this was her first time testifying as an undercover officer.

The trial judge acknowledged that there was no concern about jeopardizing "any ongoing investigation ... with respect to a particular target or with a particular conspiracy." However, he continued,

> that doesn't undermine the fact that she is now actively engaged in that geographical area and she will continue to be. It doesn't undermine the fact that from her past 30 days and even before that involvement in that area, she has reason to fear retaliation from people who might put two and two together realizing that she has been the person engaging in the undercover purchase of narcotics from those people who do business in that location.
>
> I am persuaded that the courtroom should be closed.

State court trial tr. at 35. Defense counsel did not suggest any alternatives to closure, and the trial judge did not consider any on his own motion. The courtroom was closed during the officer's testimony, which was the core of the prosecution's case.

Pearson was found guilty by a jury and sentenced to two concurrent terms of five to ten years. His conviction was affirmed on direct review. People v. Pearson, 191 A.D.2d 151, 594 N.Y.S.2d 29 (lst Dep't 1993), aff'd, People v. Martinez, 82 N.Y.2d 436, 604 N.Y.S.2d 932, 624 N.E.2d 1027 (1993).

Magistrate Judge Grubin recommended denial of Pearson's habeas corpus petition. She concluded that the closure was permissible under Waller v. Georgia, 467 U.S. 39, 47, 104 S.Ct.

2210, 81 L.Ed.2d 31 (1984), because (1) the prosecution had established an overriding interest--the officer's safety and concealment of her identity, (2) the closure lasted only during the officer's testimony, (3) no alternatives were suggested to the trial judge by defendant's counsel, and (4) the judge's findings were adequate to support the closure. In concluding that the trial judge was not obliged to consider alternatives on his own motion, the Magistrate Judge explicitly relied on Ayala v. Speckard, 1995 U.S. Dist. LEXIS 8558, 1995 WL 373419 (S.D.N.Y. June 21, 1995), a District Court decision subsequently reversed by this Court, 89 F.3d 91. Judge Leisure accepted the recommendation and denied the habeas petition, also relying on the District Court's decision in Ayala to reject defendant's contention that the trial judge was required to consider alternatives on his own motion.

Discussion

We agree with the District Court that three of the four factors outlined in Waller as requirements for courtroom closure were met in this case. First, the prosecution adequately supported an overriding interest in protecting the undercover officer from exposure of her identity. Her testimony that her undercover activity was continuing in the same neighborhood where she purchased cocaine from the defendant sufficed to indicate the State's strong interest in concealing her identity. We need not determine whether her fear of retaliation would have sufficed, though we note that this interest could be asserted by any officer presenting significant evidence against a criminal defendant. Second, we agree that the closure was no more extensive than required to protect the interest asserted. Finally, the State Court Judge's findings adequately supported his ruling.

However, Waller requires that "the trial court must consider reasonable alternatives to closing the proceeding." 467 U.S. at

48. Our decision in Ayala rejected the District Court's view that a trial judge does not have an obligation to consider, sua sponte, alternatives to closure. 89 F.3d at 96-97. That view became the holding of the Court upon consideration of the State's petition for rehearing. See Ayala v. Speckard, --- F.3d ----, ---- (2d Cir.1996). In the pending case, the state court trial judge did not consider alternatives. Some alternatives, such as placing a screen between the undercover officer and the spectators, leaving the jury's view unobstructed, or perhaps disguising her appearance appear to have been worth considering. Of course, these alternatives, and perhaps others, might themselves be disadvantageous to a defendant. Screening might imply to the jury that the defendant has dangerous friends among the spectators, and a disguise might impair the jury's ability to assess the credibility of the undercover officer. Clearly, alternatives creating such risks should not be imposed on a defendant who objects to them. Ayala requires only consideration of alternatives to closure.

Under the authority of Ayala, we conclude that the courtroom closure, without consideration of alternatives, denied the appellant his constitutional right to a public trial. See Okonkwo v. Lacy, --- F.3d ---- (2d Cir.1997). Accordingly, the judgment of the District Court is reversed, and the case remanded with directions to issue the writ, unless the State retries the defendant within a reasonable time.

JACOBS and CABRANES, Circuit Judges, concurring:

We subscribe to the opinion of the Court, and agree in particular that we are required to reverse because of Ayala's holding that a state judge violates the Sixth Amendment by closing the courtroom for the testimony of an undercover agent who is slated to return to the same duties at the same post, unless the court, on its own motion, has considered one or more

lesser alternatives. See Commodity Futures Trading Comm'n v. Dunn, 58 F.3d 50, 53-54 (2d Cir.1995), cert. granted, --- U.S. ----, 116 S.Ct. 1846, 134 L.Ed.2d 947 (1996); United States v. Ianniello, 808 F.2d 184, 190 (2d Cir.1986) ("This court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc."), overruled on merits en banc, United States v. Indelicato, 865 F.2d 1370, 1381-82 (2d Cir.1989).

We write separately to record disagreement with the Ayala holding. Ordinarily, adherence to a rule once adopted, perfect or not, serves so many useful objectives that it is pointless to record disagreement with it in a subsequent decision, let alone so soon after the opinion that announces the rule. This appeal, however, is the third occasion in recent days in which we have granted a writ of habeas corpus on the Ayala ground. See Okonkwo v. Lacy, No. 95-2626, 1997 WL 1669 (2d Cir. Jan.3, 1997); Ayala v. Speckard, 102 F.3d 649 (2d Cir.1996). It is also remarkable that the state courts have adopted a contrary principle, People v. Martinez, 82 N.Y.2d 436, 444, 604 N.Y.S.2d 932, 624 N.E.2d 1027 (1993) (Kaye, C.J.), and seem to be perfectly ready to adhere to it, notwithstanding the Ayala decision. See People v. Pepe, --- N.Y.S.2d ----, 1997 WL 7024 (1st Dep't 1997) ("To the extent that Ayala v. Speckard might require a different result, we decline to follow that case." (citations omitted)); see also People v. Lugo, 650 N.Y.S.2d 102, 103 (1st Dep't 1996) (In resolving conflict between Ayala and contrary decision by New York Court of Appeals, the ruling of the New York Court of Appeals should be followed.); People v. Nieves, 648 N.Y.S.2d 583, 585 (1st Dep't 1996). If the judges of the New York State courts, enforcing the United States Constitution by their own lights, decline to apply the Ayala principle, Ayala relief may be available only in federal court. Since Ayala imposes a sua sponte obligation on state judges that state courts may not recognize or enforce, ordinary principles of

waiver (by failure to object and failure to address on direct appeal) may lose some force, and resort to habeas corpus to enforce the Ayala principle may become commonplace.

We respectfully disagree with the holding in Ayala that the kind of closure effected here is unconstitutional unless the trial judge gives sua sponte consideration to alternatives. In Ayala, the supposed basis of that principle is given as Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), but Waller itself says nothing about sua sponte consideration of alternatives. Justice Powell, the author of Waller, earlier suggested that those who object to closure bear the burden of suggesting alternative measures. Gannett Co. v. DePasquale, 443 U.S. 368, 401, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (Powell, J., concurring). The Third Circuit agrees. United States v. Raffoul, 826 F.2d 218, 225 (3d Cir.1987). But see Ayala, 102 F.3d at 653 n. 3 (acknowledging Justice Powell's view, but noting that "[i]t could well be that Justice Powell altered his view in the interim").

The Ayala opinion also leans heavily on Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), pointing out that the Supreme Court reversed a court-room closure--in part for failure to consider alternatives--where there had been closure pursuant to an unopposed motion. Ayala, 102 F.3d at 653. But that case involved the First Amendment right of access to criminal proceedings. The consideration of alternatives sua sponte is more readily viewed as a necessary

precaution in the First Amendment context, where often the parties asserting the constitutional right (usually the press and public) are not direct parties to the case.[1]

The Ayala principle seems to be singularly unproductive in terms of any incremental benefit to a defendant or to the values of an open and fair trial. Ayala suggests that there are "numerous obvious alternatives" to closure of the courtroom during testimony by the undercover agent, and describes several examples. 102 F.3d at 653 (emphasis added). Yet it is evident that the trial court was not required sua sponte to think of all of those particular alternatives; the constitutional error identified in Ayala is giving "zero consideration". Id. But this rule raises a number of practical questions and objections. Is it enough to properly consider and reject one or more alternatives as unfeasible if some feasible alternative can be identified afterward on a petition for habeas corpus? What incentive is there for any defendant to identify alternatives to closure? How will anyone know if alternatives were considered if (as may be the case) the state courts recognize no need to give such consideration, either under state law or the federal Constitution? Specifically, in this case, how do we know that the trial court did not take the step

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[1] There is also a question as to whether closure for the testimony of a single witness is a drastic measure that, under Waller, requires consideration of alternatives at all. In Waller the trial court closed the entire proceeding (a suppression hearing). Waller in turn relies on Press-Enterprise, in which the virtual whole of a six-week voir dire was closed.

Even if every clearing of a courtroom is deemed to be a measure that requires consideration of alternatives, the trial judge here--and in Ayala and in Okonkwo--may (for all anyone knows) have judged the one-witness closure to be the least exclusionary alternative that the court could think of unaided by any better suggestion from the parties. The judge did not cast his ruling in these terms; but why should we expect to see that? State law does not require such a statement; and neither did we, until recent days.

that it took because it was a lesser measure than closure of the entire trial?

The three alternatives to closure listed in Ayala seem to us more problematical--and prejudicial to the defendant--than what was done. (i) Placing a screen in front of a witness would cloak the undercover agent with glamour; and may suggest to the jury that the defendant and the defendant's friends and family are dangerous. (ii) That risk is only partially alleviated by asking the defendant whom he wants to remain in the courtroom (a step that may not have occurred to the trial judge here because the gallery was apparently nearly empty); we assume that a defendant has a great incentive under Ayala to be inclusive, and to insist that all the world witness what he regards as his unjust ordeal. (iii) Finally, use of a "disguise"--as the opinion in this case notes--could easily impair the jury's opportunity to observe the witness and the defense's opportunity to display the witness's reactions on cross-examination (not to mention the issue of what would be an appropriate costume).

One irony of the Ayala rule is that this defendant's habeas petition would be a whole lot stronger if the trial judge had rejected the closing of the courtroom, and ordered that the undercover agent testify in disguise notwithstanding the defendant's objection. The opinion in this case properly notes that the alternatives to closure may themselves be disadvantageous to a defendant. Thus, the effect of all this is that we are compelled by our newly-minted precedent in Ayala to grant a writ of habeas corpus by reason of the trial court's failure to make a record of considering unspecified alternatives to a step that in itself seems perfectly sensible--alternatives that need not be adopted and that (if adopted) might justify reversal or habeas relief on other grounds.